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Supreme Court, U.S.
FILED
NOV 21 2006
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No. 06-300

In The
Supreme Court of the United States

JAMES FIELDS; TAMMANY FIELDS; STUART HABERMAN; KATHLEEN HABERMAN; ROBERT HOAGLIN; KATHIE HOAGLIN; VANESSA SHELTER,

Petitioners,

v.

PALMDALE SCHOOL DISTRICT; MICHAEL GEISSER; ARLAND ATWOOD,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Contrary to Petitioners' assertion, this case does not present a public policy question of exceptional importance. Petitioners maintain that the Ninth Circuit' "stepped into uncharted territory" when it determined that parents of public school children have no *free-standing* fundamental right to "exclusive" control over the introduction of sex-related information to their children. Petitioners are incorrect. Petitioners misconstrue Supreme Court precedent in an attempt to manufacture a "fundamental right" where no such right exists. The Ninth Circuit's opinion is wholly in accord with the line of Supreme Court cases addressing the right of parents to control the education and upbringing of their children. The Ninth Circuit's opinion fits squarely within the legal framework of the cases addressing similar issues. For that reason, the Petition for Writ of Certiorari should be denied.

Palmdale School District ("School District"), working in collaboration with Michael Geisser, its Director of Psychological Services, and the California School of Professional Psychology, administered a psychological assessment questionnaire to students of Mesquite Elementary in 2001. The students to whom the survey was administered ranged in age from seven to ten. The purpose and goal of the study was to "establish a community baseline measure of children's exposure to early trauma (for example, violence)," and "identify internal behaviors such as anxiety and depression and external behaviors such as aggression and verbal abuse." This information would then be used by the School District to design an intervention program to help children reduce barriers to learning. Effectively, the survey served as a tool to assist in developing mechanisms

by which students' educational/learning experiences could be improved.

Before the survey was administered, parental consent forms were sent home with the students, seeking written permission from parents to allow their children to sit for the survey. The consent form informed parents of the questionnaire's nature and purpose. The letter assured parents that the "study is 100% confidential and at no time will the information gathered be used to identify your child," and that only four people would have access to the study's information which would be "locked in storage and then destroyed after a period of five years."

The letter did not explicitly state that a few questions involved sexual topics, although it did specify that the survey questions were about "early trauma (for example, violence)" and there was a warning that "answering questions may make [the] child feel uncomfortable." Parents were given the name and contact information of the person in charge of the survey if they had any questions. They were also informed, "You may refuse to have your child participate or withdraw from this study at any time without any penalty or loss of services to which your child is entitled."

Upon approval by the School District, the survey was administered to students during school hours. Kristi Seymour ("Seymour"), a graduate psychology student and volunteer counselor at the school, sat with the students while the survey was administered. The survey consisted of three, twenty-minute questionnaires (i.e., seventy-nine questions) testing the frequency with which the students experienced a variety of sensations, emotions, thoughts, and experiences.

Several parents, after discussing the survey with their children, deemed nine of the questions to be "patently inappropriate and highly offensive considering the age of the children to whom the survey was targeted."[1]

Those parents then brought suit in the United States District Court, Central District of California alleging that "(1) Violations of their federal constitutional right to privacy; (2) Violations of their state constitutional right to privacy, guaranteed by Article 1, Section 1 of the California Constitution and the laws enacted thereunder; (3) Deprivation of their civil rights pursuant to 42 U.S.C. § 1983 ("Section 1983"); and (4) negligence." *Fields v. Palmdale Sch. Dist.*, 271 F.Supp.2d 1217, 1220 (C.D. Cal. July 18, 2003).

In their complaint, parents asserted "the right to control the education of their children such that they, and not defendants, should have exercised sole power and authority to determine whether, and if so when, their children should be exposed to subject matter similar to that set forth in the Survey." *Id.* at 1221, fn. 5.[2] Thus,

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[1] The questions involving sexual references are: 8. Touching my private parts too much; 17. Thinking about having sex; 22. Thinking about touching other people's private parts; 23. Thinking about sex when I don't want to; 26. Washing myself because I feel dirty on the inside; 34. Not trusting people because they might want sex; 40. Getting scared or upset when I think about sex; 44. Having sex feelings in my body; 47. Can't stop thinking about sex; and 54. Getting upset when people talk about sex.

[2] Parents' complaint cited generally to privacy cases outside of the Fourteenth Amendment's scope, but did not connect their asserted interest in "control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs," to the First, Third, Fourth, Fifth, Ninth, or Tenth Amendments. *Id.* at 1220, fn. 4.

parents "do not contend that they ***alone*** have the right to teach their children about sex or sexual activity, such that any instruction on those subjects at Mesquite would have violated their right to substantive due process. Rather, they argue that they have the right to control *when* their children are exposed to those topics, such that instruction without their informed consent violated the Fourteenth Amendment. The parents' asserted liberty interest thus concerns the ***timing*** of the instruction, more than its substance . . . " *Id.* at 1222, fn. 8.

In response to the parents' complaint, the School District filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

In its ruling on the motion, the District Court noted that "all of the Parents' arguments concerning the claim are grounded in the Fourteenth Amendment's Substantive Due Process Clause." *Id.* The District Court also noted that the Supreme Court has cautioned lower courts to refrain from extending the reach of the Substantive Due Process Clause to "previously unprotected liberty interest[s]." *Id.* at 1222 [quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)].

With these parameters in mind, the District Court described the issue presented as "whether the Parents' asserted liberty interest in 'control[ling] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs, pursuant to the Constitutionally protected right to privacy,' qualifies as a fundamental right for purposes of the Fourteenth Amendment." According to the District Court, "the Supreme Court has repeatedly emphasized two principles for substantive due

process analysis. [Citation.] First, the Court has required a 'careful description' of the asserted fundamental right. [Citation.] Second, the Court has stated that the Due Process Clause protects, above all, those fundamental rights that are objectively 'rooted in the traditions and conscience of our people' [citation], or 'implicit in the concept of ordered liberty [citation].'" *Id.* at 1222.

In analyzing the parents' asserted liberty interest (i.e., to control *when* their children are exposed to topics relating to sex) in this case, the District Court found the fundamental right was "drawn narrowly enough to satisfy the first principle stated above." *Id.* However, the District Court concluded the parents' interest was not "'deeply rooted in this Nation's history and tradition,' [citation], such that "'neither liberty nor justice would exist if [it] were sacrificed,' [citation]." As such, the District Court held "that the liberty interest asserted by the parents is not fundamental in nature and not protected under the Substantive Due Process Clause of the Fourteenth Amendment." *Id.* at 1223.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. The Ninth Circuit framed the issue as follows: "The question before us is simply whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children. It is clear, and the parents agree, that no court has ever held that parents have a specific fundamental right 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs.'" *Fields v. Palmdale Sch. Dist. (PSD)*, 427 F.3d 1197, 1203-1204 (9th Cir. 2005).

"Thus, whether the parents have a constitutional right to exclusive control over the introduction and flow of sexual information to their children depends entirely upon whether the asserted right is encompassed within some broader constitutional right." *Id.* at 1204. The parents therefore argued that the right they seek to invoke is encompassed within "the fundamental due process right to make decisions concerning the care, custody, and control of their children."[3]

The Ninth Circuit concluded, "The parents' asserted right 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs,' by which they mean the right to limit what public schools or other state actors may tell their children regarding sexual matters, is not encompassed within the *Meyer-Pierce* right to control their children's upbringing and education." *Id.* at 1207.

The Court of Appeals explained:

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by

[3] This right is commonly referred to as the *Meyer-Pierce* right because it finds its origin in two Supreme Court cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

> *Meyer* and *Pierce* do not encompass a broad-based right *to restrict the flow of information* in the public schools. . . . *Meyer*, *Pierce*, and their progeny "evince the principle that the state cannot prevent parents from choosing a specific educational program," but they do not afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense. *Id.* at 1205-1206.

The parents argued alternatively that the right "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs" is encompassed within their constitutional "right to privacy with respect to intimate decisions." *Id.* at 1207. The Ninth Circuit concluded:

> Although the right to privacy provides a different source for the right the parents seek to assert than does *Meyer-Pierce,* like *Meyer-Pierce* it does not encompass that right. The Supreme Court has identified at least two constitutionally protected privacy interests: the right to control the disclosure of sensitive information and the right to "independence when making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977). The parents do not allege that their children were forced to disclose private information. Their argument here is only that the survey violated their own right to make important decisions regarding the manner and timing of exposing their children to sexual matters. *Id.* at 1207.

While recognizing "the significance of these rights," the Ninth Circuit noted "the survey simply did not interfere with the right of the parents to make intimate

decisions. Indeed, before the survey was conducted the parents were notified and their consent was sought. None objected and all but one signed and returned the consent form. Making intimate decisions and controlling the state's dissemination of information regarding intimate matters are two entirely different subjects. With respect to the latter, no information of a private nature – indeed no information at all – regarding any individuals was disseminated." *Fields v. Palmdale Sch. Dist. (PSD)* 447 F.3d 1187, 1191 (9th Cir. 2006). "[T]he right of the parents 'to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs' – the right to privacy here asserted – does not entitle them to prohibit public schools from providing students with information that the schools deem to be educationally appropriate." *Id.*

Having determined that the School District's use of the psychological survey in question did not impinge upon parents' fundamental due process rights, the Ninth Circuit concluded that the survey constituted "reasonable state action pursuant to legitimate educational, as well as health and welfare, interests of the state." *Id.* at 1211.

In response to parents' petition for rehearing en banc and the *amici* brief in support thereof, the Court of Appeal's panel decided to consider whether to rehear the matter *nostra sponte*, but unanimously determined not to do so and thereafter reaffirmed its decision filed on November 2, 2005. *Fields v. Palmdale Sch. Dist. (PSD)*, supra, 447 F.3d 1187.

REASONS FOR DENYING THE WRIT

I. A COMMENT ON THE TENOR OF PARENTS' PETITION FOR WRIT OF CERTIORARI.

Preliminarily, the School District notes that Petitioners seek to pique the Court's interest in this case with misleading rhetoric and overstatements about the impact of decision of the Court of Appeals. For example, Petitioners repeatedly assert the School District "tricked them" into consenting to a "sexually-explicit" survey "shocked and shamed the [Petitioner's] children and robbed them of their innocence" by introducing the children "to subjects of masturbation, sexual imagery, lust, sex, sexual opportunism, sexual anxiety, sex drive, sexual compulsions and sexual assault . . . " (Petition, pp. 2, 4, 26-27) Petitioners also proclaim, "The Ninth Circuit's decision castrates Supreme Court precedent. It is an assault on parental authority." (Petition, p. 15) They characterize the Ninth Circuit's opinion as "concluding that parents' fundamental interests can ***never*** overcome the interests of public schools in educating their children free from parental interference." (Id. at p. 8)

Petitioners' statements exaggerate the factual underpinnings of the case, as well as the breadth of the Court of Appeals' decision. This type of hyperbole is seldom useful to the Court in its evaluation of a petition for writ of certiorari. In fact, Petitioners' resort to this type of embellishment is a clear sign that the issues presented for review are lacking in the qualities normally associated with certiorari.

II. THE COURT OF APPEALS' DECISION IN THIS CASE DOES NOT CONFLICT WITH PREVIOUS PRECEDENT OF THIS COURT.

In their petition, the parents assert the Ninth Circuit's "unprecedented" decision is "so broad that it eviscerates parental rights recognized by this Court." (Petition, p. 7) They urge the Court to grant certiorari to ensure "that public school officials [will not] *replace* the parents' prerogatives on when and how their children are introduced to matters concerning sex and sexuality." (Id. at p. 6)

Petitioners are clearly wrong in asserting that the Ninth Circuit's decision is "unprecedented." To the contrary, the Ninth Circuit followed established precedent and was highly cautious not to create new rights and interests where none existed. As noted by the District Court:

> In deciding whether to expand the scope of substantive due process to include the liberty interest asserted by the Parents, this Court is mindful of the fact that the Supreme Court has cautioned courts to be "reluctant to expand the concept of substantive due process[,] because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). Extending the reach of the Substantive Due Process Clause to a previously unprotected liberty interest not only potentially "place[s] the matter outside the arena of public debate and legislative action," *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997), but also contains an inherent risk that the policy preferences of the judiciary will unduly influence constitutional law, *Moore v. East Cleveland,* 431 U.S. 494, 502 (1977) (plurality

opinion). *Fields v. Palmdale Sch. Dist.*, supra, 271 F.Supp.2d at 1222.

The Ninth Circuit was likewise mindful of previous precedent of this Court on the issue of parental rights:

> There can be no doubt that the Due Process Clause does protect the parents' right to control their children's upbringing. That right was recognized in two leading Supreme Court cases, *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Our opinion does not in any way quarrel with or constrict the right established by those cases. However, . . . as we explained at length in our opinion, the *Meyer-Pierce* right (and the closely related privacy right) does *not* include the "right to restrict the flow of information in the public schools." *Fields,* 427 F.3d at 1206 (quoting *Brown v. Hot, Sexy & Safer Prods., Inc.),* 68 F.3d [525,] 533-34 [(1st Cir. 1995)]). Indeed, parents "do not have a fundamental [due process] right generally to direct *how* a public school teaches their child." *Id.* (quoting *Blau v. Fort Thomas Pub. Sch. Dist.,* 401 F.3d 381, 395 (6th Cir. 2005)). That is the central holding of our opinion and no party interested in this case, including Appellants and *amici,* has cited any authority holding otherwise. *Fields v. Palmdale Sch. Dist.*, supra, 447 F.3d at 1189-1190.

A. No Case in the *Meyer-Pierce* Line Has Recognized a Parental Right of Exclusive Control Over "Sex-Related Information" to Which Children Are Exposed in Public Schools.

Petitioners, in effect, want to extend the recognized right of parents to control the upbringing of their children to include exclusive control over sex-related information to which children are exposed in public schools. The Court of Appeals' determination not to extend this parental right is consistent with the precedent of this Court.

In addition to this Court's decisions in *Collins v. Harker Heights*, *Washington v. Glucksberg* and *Moore v. East Cleveland* [cited by the District Court in this case], Justice Stevens in *Troxel v. Granville*, 530 U.S. 57 (2000), cautioned in his dissenting opinion against utilizing the "broad language about the scope of parents' due process rights with respect to their children" found in *Pierce* beyond the factual context of the case. *Id.* at 86, fn. 7.

Justice Scalia voiced similar concerns in *Troxel* when he commented that:

> The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context. *Id.* at 92.

Justice Scalia warned the nebulous and uncertain nature of the *Meyer-Pierce* line of cases means that "courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." *Id.* at 95-96.

Justice Souter's concurring opinion also noted: "Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child. . . ." *Id.* at 78.

Furthermore, Petitioner's mischaracterize the Court's holding in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as requiring deference to parental rights on this issue. (Petition, pp. 9-10) Petitioners argue that in *Yoder* "this Court again acknowledged the fundamental interest that parents have in directing the upbringing of their children and ruled that the State's interest in public education cannot infringe upon those rights. . . ." (Petition, p. 9).

In *Yoder*, the Court's inquiry was circumscribed to an analysis of compulsory secondary education as it related to the "fundamental mode of life mandated by the Amish religion." *Yoder*, 406 U.S. at 217. The precise question before the Court was whether Wisconsin's compulsory-attendance law conflicted with the fundamental tenants of the Amish religion. In determining that the compulsory-attendance law carried with it the "objective danger" of undermining the group's religious values, the Court noted that "the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's

requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id.* at 219.

The holding in *Yoder* has never been read to mean that parents are vested with a veto right to determine if, when, and how their children will be exposed to information related to sex in public schools. As the Court explained in *Runyon v. McCrary*, 427 U.S. 160, 177 (1976), the Court in *Yoder* "stressed the limited scope of *Pierce*," and noted that parents do not have the right to supplant state educational requirements with their own idiosyncratic views regarding education. A state may formulate educational standards, but it cannot force children to attend public schools. *Id.* "Indeed the Court in Pierce expressly acknowledged 'the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . '" *Id.* at 178-179 [quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534].

In sum, no case in the *Meyer-Pierce* line has recognized a parental right of exclusive control over "sex-related information" to which children are exposed in public schools. The Ninth Circuit correctly determined that the recognition of such a right in this case would have run afoul of established precedent of this Court. Such an alleged right is not deeply rooted in the "nation's history and tradition or implied in the concept of ordered liberty." *Fields*, 427 F.3d at 1204. The Ninth Circuit's decision, therefore, is wholly in accord with the Supreme Court's directive in *Troxel* that Court's must be circumspect and cautious in their analysis in these types of cases.

B. Neither *Troxel* Nor The *Meyer-Pierce* Line of Cases Require the Judiciary to Engage in a Balancing of Interests Every Time a Legitimate State Action Conflicts with the Values of a "Fit Parent."

Petitioners also argue for the first time that certiorari is warranted in this case because the Ninth Circuit's decision afforded no consideration to the presumption recognized by this Court "that fit parents act in the best interests of their children." (Petition, p. 6)

The "fit parent presumption" advanced by Petitioners is derived from this Court's decision in *Troxel v. Granville*, supra, 530 U.S. 57 – a visitation case in which the Court supported its decision by noting that "the Troxels did not allege, and no court has found, that Granville was an unfit parent." *Id.* at 58. In fact, the Court noted, "There is a presumption that fit parents act in their children's best interests." *Id.*

In this case, there was no need to apply a presumption; there is no evidence on which to question Petitioners' fitness as parents. There is also no reason to doubt "that fit parents act in the best interests of their children." What Petitioners are trying to do is expand the language of *Troxel* to mean that every time a legitimate state action conflicts with the values of a "fit parent" the judiciary is required to engage in a balancing of interests. Petitioners have extracted selective quotations from the *Meyer-Pierce* line of cases to suggest there is a "balancing" requirement in every case involving parental rights.

As noted above, the Supreme Court has cautioned courts to be "reluctant to expand the concept of substantive due process[,] because guideposts for responsible

decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992). In fact, various individual members of this Court have voiced particular concern about over-extending the parental rights found in the *Pierce-Meyer* line of cases. *Troxel v. Granville*, supra, 530 U.S. at 86, fn. 7, 92 and 95-96.

In any event, it is clear the Ninth Circuit *did* balance the rights of the parents against the School District's stated objectives in this case. On the one hand, the Court of Appeals pointed out that "The Supreme Court has held that the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause." *Fields*, supra, 427 F.3d at 1204. The Court of Appeals also recognized the parents' right to privacy, which in its earliest formulation "was used essentially to protect the family structure." *Id.* at 1208 [citing *Pierce* and *Meyer*]. The Court of Appeals noted "the right to privacy also protects important parental decisions such as whether to bear children, who has control over children, and other decisions related to procreative autonomy." *Id.* In fact, the Ninth Circuit stated, "We cannot overstate the significance of these rights." *Id.*

On the other hand, the appellate court recognized the School District had:

> prepared the psychological survey as an "assessment [] to establish a community baseline measure of children's exposure to early trauma." Protecting the mental health of children falls well within the state's broad interest in education. . . . [T]he psychological survey's ultimate objective was, according to an exhibit to the complaint, to

> improve students' ability to learn. The exhibit reveals that the survey was intended to gauge exposure to early trauma and to assist in designing an intervention program to help the School District reduce barriers to students' ability to learn. Although the students who were questioned may or may not have "learned" anything from the survey itself and may or may not have been "taught" anything by the questions they were asked, the facilitation of their ability to absorb the education the school provides is without question a legitimate educational objective. *Id.* at 1209-1210.

The Ninth Circuit concluded, "Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District – whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy." *Id.* at 1206.

> If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems . . . *Id.* at 1205.

Thus, it is not true, as Petitioners suggest, the Ninth Circuit "failed" to recognize or even consider "the fundamental liberty interest of fit parents to direct the upbringing of their children" in the school setting. (Petition, pp. 8-9)

III. THE COURT OF APPEALS' DECISION IN THIS CASE DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

Petitioners next assert the Court of Appeals' decision in this case "hold[s] that parental rights in the school setting are nonexistent beyond that parents' choice of where to send their children to school." (Petition, p. 23) Based on that erroneous assumption, Petitioners assert the Ninth Circuit has created an "unprecedented bright line rule" which "conflicts with numerous circuit courts." (Id. at p. 19)

Based on the forgoing discussion, the School District submits that Petitioners are attempting to create a conflict between the circuit courts where none exists. In fact, the Court of Appeals cited numerous other circuit court cases in its opinion that "have recognized the constitutionality of a wide variety of state actions that intrude upon the liberty interest of parents in controlling the upbringing and education of their children." *Id.* at 1204-1205. Contrary to Petitioners' suggestion, the cases cited included decisions from the Second, Third, Fourth, and Fifth Circuits. *Id.*[4]

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[4] The cases cited by the Court of Appeals in this case, include *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003); *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir. 1998); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001).

The case from the Eleventh Circuit on which Petitioners rely, *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989),[5] does not conflict with the Ninth Circuits' opinion in this case. In *Arnold*, the Eleventh Circuit held "a parent's constitutional right to direct the upbringing of a minor is violated when the minor is coerced to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion." *Id.* at 312. However, the Eleventh Circuit declined to "constitutionally mandat[e] that counselors notify the parents of a minor who receives counseling regarding pregnancy." *Id.* at 314.

> We hold merely that the counselors must not coerce minors to refrain from communicating with their parents. The decision whether to seek parental guidance, absent law to the contrary, should rest within the discretion of the minor. As a matter of common sense, **not constitutional duty**, school counselors should encourage communication with parents regarding difficult decisions such as the one involved here. *Id.*

In so ruling, the Eleventh Circuit specifically recognized "that parental autonomy to direct the education of one's children is not beyond limitation." *Id.* at 314 [citing *Pierce*]. The *Arnold* court also concluded, as the Ninth Circuit concluded in this case, that "When parents enroll their children in public schools, they cannot demand that the educational program be tailored to their individual preferences." *Id.*

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[5] The *Arnold* opinion has since been overruled on other grounds. See *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004).

The Ninth Circuit's decision likewise recognized that Petitioners' legitimate concerns, while not constitutionally mandated by judicial action, may be addressed by other means.

> Although we reach our conclusions with little difficulty and firmly endorse the School District's authority to conduct a survey for the purposes involved here, we reiterate that we express no view on the wisdom of posing some of the particular questions asked or of conducting an inquiry into some of the particular areas surveyed by the School District. That determination is properly left to the school authorities. *Fields,* 427 F.3d at 1211.
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> * * *
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> What information schools provide is a matter for the school boards, not the courts, to decide. Our holding does not . . . address the propriety of the school allowing the survey to be circulated. . . . [O] ur decision does not affect the rights of parents to influence or change the conduct of school boards through all lawful means generally available to citizens of this nation. *Fields,* 447 F.3d at 1190.

IV. THE COURT OF APPEALS DID NOT "FAIL TO RECOGNIZE PETITIONERS' DUE PROCESS RIGHTS."

Petitioners also contend certiorari should be granted because the Ninth Circuit "cast aside" Petitioners' due process claims. (Petition, p. 15)

Actually, Petitioners themselves are responsible for the Court of Appeals' "failure" to address their belated due

process claims. As the Ninth Circuit noted in its subsequent per curiam opinion on rehearing *nostra sponte*, two weeks after the Court filed its opinion, Petitioners replaced their local attorneys with a national organization located in Florida. *Fields,* 447 F.3d at 1189. Petitioners' new counsel filed a petition for rehearing en banc seeking to argue for the first time that "the panel's decision eviscerates plaintiffs' procedural due process rights." *Id.*

> Appellants' . . . argument, that our opinion "eviscerates Plaintiffs' procedural due process rights," ignores the following: (1) Appellants did not raise a procedural due process claim in the district court, (2) Appellants did not raise a procedural due process claim on appeal, and (3) our opinion did not address any procedural due process claim. We need do no more here than state the obvious: We do not address issues not presented to us, and our failure to do so does not constitute an expression of views as to the merits of any such issues.
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> * * *
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> Similarly, no questions relating to "state-recognized rights" were presented to us and we ruled on none. Appellants' state law claims were not before this court on appeal. The district court dismissed the state law claims without prejudice to refiling in state court, and on appeal Appellants did not raise any issue relating to that dismissal. Nor did Appellants assert any federal due process right "grounded in state-recognized rights." The only due process right presented on appeal was the *Meyer-Pierce* substantive due process right of parents to make decisions concerning the upbringing of their children along with the closely related right to privacy.

* * *

> We consider on this appeal only the issues presented by the parties initially in the district court and then to us when we heard the matter as a three-judge panel. We do not consider on rehearing new issues previously not raised, briefed or argued. *Id.* at 1189.

Since Petitioners did not timely raise any due process claim, this case is not a proper vehicle for Supreme Court review of any alleged "due process violations."

V. THE COURT OF APPEALS DID NOT MISAPPLY FEDERAL COURT DISMISSAL STANDARDS.

Petitioners also urge the Court to grant certiorari in this case because "the District Court's dismissal of a complaint without leave to amend is improper . . . " (Petition, p. 16) Petitioners accuse the Ninth Circuit of "sidestep[ping] decades of Supreme Court precedent" by "failing" to allow parents to amend their complaint. (Id.)

As with their due process claims, Petitioners ignore the fact that they themselves are to blame for this perceived shortcoming in the proceedings below. This issue was not raised by Petitioners until their petition for rehearing. In addressing petitioner's contention, the Ninth Circuit explained that "Appellants did not seek leave to amend in the district court, nor did they contend on appeal that they could have amended the complaint if permitted to so do. Thus to the extent that new counsel now complain that no amendment was permitted, their complaint is wholly without merit." *Fields*, 447 F.3d at 1189. "[T]he panel did not, as the petition asserts, 'dismiss [] on a Rule 12(b)(6) motion'; that motion was heard and granted by

the district court. We merely affirmed the district court's ruling." *Id.*

As to Petitioners' suggestion that the Ninth Circuit "had to accept as true" their allegations that the School District "had no justification or proper purpose for [its] actions" (Petition, p. 18), the Ninth Circuit observed:

> The allegation is entirely speculative and conclusory in nature. No facts are offered in support of the parents' theory. Although in other circumstances we might dismiss such an allegation with leave to amend, it is apparent here that such a dismissal could not in the end aid the parents in stating a claim. Attached to the complaint is detailed information setting forth the legitimate governmental purpose of the survey and explaining with specificity how the information obtained will be used for educational purposes and how it will ultimately benefit the School District and its children. Given the inclusion in the complaint of this specific information establishing the legitimacy of the School District's action, we must, even for purposes of a motion to dismiss, approach the application of the rational basis test from the premise that the School District had a legitimate educational purpose in undertaking the survey. *Fields*, 427 F.3d at 1209.

VI. PETITIONERS OVERSTATE THE IMPACT OF THE COURT OF APPEALS' DECISION IN THIS CASE.

Petitioners advance a theory of parental rights that would tie the hands of public school boards and their administrators in improving the quality of education in public schools. Modern developments in psychology have

given human behavioral specialists the ability to study, isolate, and overcome psychological barriers to learning. Our public schools should be praised for attempting to incorporate these scientific mechanisms into the milieu of public education. If our public schools are tasked with preparing our nation's youth for success and the ability to function productively in the modern world, this Court would do the public a great disservice by affording a select few a "veto right" over the decision of school boards and its administrators as to how students of public schools should be educated. In Petitioners' ideal world, every parent of a public school student would sit as a super-oversight board and utilize federal court's as their enforcement venue to challenge and strike down a school's course of conduct when such conduct does not conform to a parent's moral or religious world-view.

The school was acting for the benefit of the its students (and the public at large) when it sought to better its understanding of psychological barriers to learning. The contention that the Ninth Circuit "irrebuttably presumes" that public schools are acting in the a child's best interest is incorrect. No such presumption was part of the Court's holding. The suggestion that the Court's opinion somehow shield's public schools from constitutional scrutiny is a fundamental misreading of the case. The Court undertook a detailed examination of whether the state in fact had a legitimate interest in administering the survey. It explained that "education is not merely about teaching the basics of reading, writing, and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders with diverse backgrounds." *Fields*, 427 F.3d at

1209 [citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)]. The ultimate aim of the survey was to reduce barriers to students' ability to learn. This aim serves the public good and the mission of public schools to nurture and mold its student body into productive members of society. That objective was a legitimate interest of the state in the eyes of the Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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